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In the Supreme Court of the United States

October Term, 1992

ROBERT TAYLOR and TIMOTHY COTTON
Petitioners,

v.

FLORIDA ATLANTIC UNIVERSITY, HELEN POPOVICH, KENNETH MICHELS, DENNIS NICEWANDER, DON GARDNER, MARILYN FLOYD, LEONARD BERRY, and ANTHONY CATANESE,
Respondents.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

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PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether 42 U.S.C. § 1983 requires proof of intent to violate a plaintiff's rights?

2. Whether the First Amendment imposes an intent requirement on those seeking redress for a conspiracy to violate their free speech rights?

3. Whether the courts below misinterpreted the Federal Rules of Evidence by refusing to admit expert testimony regarding the pattern and practice of retaliation against whistleblowers for exercise of First Amendment free speech rights?

LIST OF INTERESTED PARTIES

The parties to the proceeding below were petitioners, Robert Taylor and Dr. Timothy Cotton, and respondents, Helen Popovich, Kenneth Michels, Dennis Nicewander, Don Gardner, Marilyn Floyd, Leonard Berry, Anthony Catanese, and Florida Atlantic University ("FAU"). FAU is a public university of the State of Florida under the Florida Board of Regents. All of the individual respondents were sued in their official and individual capacities, except for respondent Catanese, who was sued in his official capacity only, being substituted on April 12, 1991, for respondent Popovich in her official capacity. None of the petitioners are corporations subject to the requirements of Supreme Court Rule 29.1.

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Petitioners, Robert Taylor and Dr. Timothy Cotton, ask this Court to grant their petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eleventh Circuit entered in this civil proceeding on September 29, 1992.

OPINIONS BELOW

The decision of the Court of Appeals for the Eleventh Circuit, entered without a written opinion, is referenced at 976 F.2d 743 and is reprinted in the appendix hereto at 1a. The judgment and rulings below that are the subjects of this petition are unpublished. They are reprinted in the appendix at 3a-22a.

JURISDICTION

Petitioners Taylor and Cotton filed this civil rights action on January 30, 1989, in the United States District Court for the Southern District of Florida. Petitioners invoked the district court's jurisdiction pursuant to 28 U.S.C. §§ 1331, 1343, 2201, 2202 and 42 U.S.C. § 1983, seeking monetary damages and declaratory and injunctive relief for the violation of their free speech rights as guaranteed by the First and Fourteenth Amendments to the United States Constitution. The United States District Court, Hon. James C. Paine, entered final judgment in favor of respondents on May 17, 1991. *See* Appendix 3a. Petitioners then filed timely post-judgment motions on May 23 and 28, 1991. The district court denied these motions on May 28, 1991 and other post-trial motions on July 31, 1991.

Petitioners invoked the appellate jurisdiction of the United States Court of Appeals for the Eleventh Circuit pursuant to 28 U.S.C. § 1291, by timely filing their notices of appeal with the district court on June 14, 1991, and August 22, 1991. On September 29, 1992, the court of appeals affirmed the district court's judgment. *See* Appendix, 1a. Justice Kennedy, on behalf of this Court, granted petitioners an extension until January 27, 1993, to file this petition. *See* Application A-435 (Dec. 1, 1992). Petitioners now file this petition pursuant to 28 U.S.C. §§ 1254(1), 2101(c), and the rules of this Court.

STATUTES INVOLVED

The following provisions of the Constitution of the United States are implicated in this case: U.S. Const.,

Amendments I and XIV. This case also implicates 42 U.S.C. §1983 and Fed.R.Evid. 701-705. The full text of these provisions is reproduced in the appendix, 23a-25a.

STATEMENT OF THE CASE

A. Introduction

This case involves the wrongful discharge of a state university's employees for exercising their core First Amendment rights. Petitioners Taylor and Cotton contend that they were discharged from their positions at Florida Atlantic University [hereinafter FAU], after more than 30 years of combined service, because of their whistleblowing activities. Respondents are FAU, its President, and other key officials of this state university. FAU discharged Taylor and Cotton after they exposed, to regulatory officials and the public, the improper spending of public funds.

This First Amendment "whistleblower" case raises important questions concerning the elements of a claim under 42 U.S.C. § 1983. The courts below, over petitioners' objections and in direct contravention of the rulings of this Court and several circuits, ruled that a plaintiff must prove that state officials, in taking adverse employment action, *intended* to violate plaintiff's constitutional rights. This ruling seriously infringes upon these and other plaintiffs' exercise of their First Amendment rights by allowing defendants to disguise constitutional violations as unactionable reckless or negligent acts.

This case also eviscerates a plaintiff's right to use expert witnesses to establish the pattern of the constitutional violation. Contrary to the plain meaning of the Federal

Rules of Evidence and established jurisprudence interpreting the rules, the courts below held that a plaintiff may not use expert witnesses to establish the modus operandi of a First Amendment retaliatory firing. This ruling chills free speech by preventing plaintiffs from proving the common pattern of such unconstitutional action.

In addition to their deleterious impact on the present case, the rulings below seriously erode well-established First Amendment guarantees under the guise of procedural decisions. Petitioners believe that the important constitutional implications of the underlying rulings compel the grant of their petition.

B. The Facts

Petitioner Robert Taylor began working at FAU in 1971 as a Computer Systems Analyst. Between his employment in 1975 and 1985, he was promoted several times with each promotion involving substantial raises and increases in supervisory authority. After his promotion to Associate Director of Academic Computing in 1985, Taylor's responsibilities included reviewing and recommending approval or disapproval of any FAU computer purchases.

In November 1985, Taylor disapproved a purchase from Gulfstream Micro Systems [hereinafter Gulfstream] of computer equipment ordered by the Dean of the FAU College of Business because: (1) it had not been competitively bid, as required by state regulations; and (2) Taylor believed that Gulfstream employed faculty members of the College of Business. Taylor's decision was reviewed

by respondent Dennis Nicewander, the FAU Vice-President of Administrative Affairs, who approved the purchase.

Upon further investigation during the spring and summer of 1986, Taylor and others discovered numerous additional improprieties and apparent illegalities in purchasing procedures used by certain FAU staff and administrative personnel, which had resulted in overpayment of public funds. These improprieties included: (1) purchase of nine personal computers; (2) acquisition of mobile homes; (3) purchase of travel agency services; and (4) failure to impose physical property controls, all in violation of Florida State Purchasing Regulations. Auditor Harvey Sweeney testified that FAU paid more for the Gulfstream equipment than it would have paid for equivalent equipment under an existing state contract.

Taylor reported the improper Gulfstream computer purchase to FAU's Computer Advisory Committee. He was told curtly that the Gulfstream purchase was none of his concern. He then shared the information with Dr. John Munson, a trusted friend who was Chairman of the FAU Computer and Information Resources Department, and with petitioner Dr. Timothy Cotton, a fellow employee who was then a Computer Systems Coordinator. The three men agreed that Dr. Munson would approach the Administration with Taylor's discovery, as Munson's tenure would protect him if the Administration were to react in a hostile manner. Dr. Munson, as Taylor's intermediary, then approached the Administration, which effectively ignored the purchasing violations uncovered by Taylor.

In September 1986, Munson approached the Palm Beach County State Attorney's Office with Taylor's

findings. At first, Taylor's and Cotton's identities were concealed. Eventually, Taylor cooperated with Investigator Tim Valentine of the State Attorney's Office, because Taylor was the most knowledgeable about the improprieties. Valentine's extensive investigation, aided by Taylor, uncovered evidence sufficient to warrant turning the investigation over to Harvey Sweeney, Internal Auditor Director of the Florida Board of Regents. In October 1986, Sweeney asked Cotton and Taylor to participate in his investigation of the spending improprieties at FAU.

On October 9, 1986, respondent Provost Michels told Taylor that the Administration was aware that Taylor had assisted the State Attorney's investigation at FAU. Michels threatened Taylor, stating that people could be fired for giving out information about the University.

On October 30, 1986, Internal Auditor Director Sweeney and the State Attorney issued a joint report concluding that there had been improper allocation of resources, poor management, inadequate supervision, and circumvention of normal procedures by academic and administrative personnel in acquiring and receiving goods. Following this report, Respondent Helen Popovich, the President of FAU, called a cabinet meeting at which both Taylor and Munson were present. Popovich stated that there was no problem and then ended the meeting. Taylor then discussed further approaches with Cotton, Munson, State Investigator Valentine, and Internal Auditor Director Sweeney.

Valentine suggested that public scrutiny might afford Taylor some protection from a vindictive Administration. After considering this and other advice, Taylor spoke to the

press, as Dr. Munson had done previously. Also, Cotton eventually was approached by and spoke to the press.

Following the publicity generated by the press interviews of Munson, Cotton and Taylor, respondent Nicewander distributed a "gag rule" memorandum to FAU personnel prohibiting them from speaking to the press and instructing them to direct all media inquiries to an administrative spokesperson. Nicewander testified that this memo was issued to keep the press from distracting FAU employees. However, Adelaide Snyder, then FAU Vice President in charge of media relations and one of Popovich's closest advisors, testified that Nicewander's "gag rule" memo was issued to prevent Cotton and Taylor from further speaking with the press.

Shortly after the press reports, Ms. Snyder attended several "cabinet" meetings where some respondents, *i.e.*, the highest officials at FAU, plotted to fire Taylor and Cotton for their whistleblowing. She testified that firing Taylor and Cotton was the only topic discussed at several meetings in late 1986 (even though the respondents were responsible for operating a large University). She described one such meeting at which respondents Popovich, Michels, and Nicewander all agreed that creating a "paper trail" of poor job performance would be the best way to justify firing Taylor and Cotton for their whistleblowing. Ms. Snyder also heard Nicewander say that the sooner Taylor and Cotton were gone the better. She testified that Popovich thought removing Taylor and Cotton was the best "solution" to the problems at FAU. Accordingly, those three respondents instructed their employees, including Cotton's and Taylor's superiors, to create this "paper trail." While Popovich initially testified that Cotton and Taylor were never

mentioned during the cabinet meetings, on cross-examination, she admitted that Taylor was the subject of a cabinet meeting in 1986. At one point, respondent Michels said that the FAU cabinet felt besieged by the intensely critical media coverage.

On December 6, 1986, respondents Michels and Nicewander resigned from their respective positions as FAU Provost and Vice President. (Respondent Popovich resigned in the summer of 1989.) Six months after Michels resigned as Provost, respondent Leonard Berry was appointed as Provost and Vice-President of Academic Affairs. The evidence shows that Berry also adopted Michels' crusade to rid FAU of Taylor and Cotton. Berry told Dr. James Sycamore, an FAU professor and Provost of FAU's Broward facility, that Taylor and Cotton were going to be fired for their whistleblowing.

In 1987, after the FAU mismanagement had been publicized, Taylor received his first written counseling notes in more than two years from William King, his immediate superior. King's previous suggestions concerning Taylor's job performance had been delivered orally, face-to-face. In August 1986, before disclosure of Taylor's discovery of purchasing improprieties, Taylor had received the largest pay raise in his department for his outstanding work and contributions to the Academic Computing Department. After his whistleblowing, Taylor received the smallest pay raise in his department.

FAU's retaliation against Taylor and Cotton continued in 1988. In February 1988, King notified Taylor that Taylor was being transferred to FAU's Broward County campus. Taylor, believing that the transfer was a

punishment for his whistleblowing, took his opposition to President Popovich. Popovich rescinded Taylor's transfer after consulting with counsel.

As Dr. Cotton was in charge of academic computing at the FAU Broward campus, Taylor's possible transfer interested him, but King never discussed Taylor's transfer with Cotton. Dr. Cotton vigorously and vocally opposed that transfer and sent memoranda to King evidencing his opposition. During a conversation on the subject, King told Cotton that Cotton's own position was going "to roll out in July." Dr. Cotton considered this comment a warning that continued opposition to the transfer would jeopardize his own job.

FAU's retaliation against petitioners also surfaced in connection with the planned merger of the university's administrative and academic computing departments. This merger, originally planned while King was petitioners' supervisor, did not take place until after July 1988, after King had left the university. Snyder testified that she was present at cabinet meetings where respondents Popovich, Michels and Nicewander agreed that the person hired to replace King would be told that part of his job was to fire Cotton and Taylor. FAU hired respondent Gardner in 1988 to fill this position. While Gardner was interviewing for the job, respondent Marilyn Floyd, King, and Colter told him that Taylor had been a personnel problem. Gardner testified that King "was very negative about Tim Cotton at that point." Even before Gardner's office had been furnished, he had a conversation with Ms. Snyder concerning her knowledge about the plan to terminate Cotton and Taylor. Gardner told Ms. Snyder that he knew

his superiors wanted Cotton and Taylor fired, and that he would be better off if he sacked them.

Taylor and Cotton, as heads of important sections within the computer department, believed that newly arriving Gardner would be interested in discussing their ideas concerning the pending merger of academic and administrative computing. Taylor compiled a list of questions and discussion topics in anticipation of meeting with Gardner. To his surprise, Gardner was uninterested in anything Taylor had to say regarding computer operations. A few days later, Gardner gave Taylor a terminal contract. Thus, after nearly 15 very successful years at FAU, Taylor had just one year to work at FAU. During his terminal year, Taylor's previously substantial responsibilities were drastically reduced. The 20 or so employees who had reported to Taylor were removed from his supervision, and his office was moved from the center of the Academic Computing area to a remote corner of the department.[1]

Dr. Cotton, likewise expecting Gardner to be interested in his views, compiled a list of 20 questions as a topical guide in his conversation with Gardner; he even sent the list to Gardner a few days before their meeting. Again, however, Gardner had his own agenda, so he largely ignored Cotton's list. As with Taylor, Gardner issued Cotton

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[1] Following his final days at FAU, Taylor searched exhaustively for new employment. Despite his efforts, Taylor has been unable to acquire work consistent with his training and experience. At the time of trial, Mr. Taylor worked as a bookstore clerk, earning $4.50 per hour.

a terminal contract less than a week after their meeting. Dr. Cotton had worked at FAU for nearly 15 years.

Taylor and Cotton were the only administrative and professional employees whose contracts were not renewed as a result of the reorganization. Though Popovich testified that Cotton was asked to leave "because there was widespread user dissatisfaction of [sic] the quality of his work," Gardner explained that Taylor's and Cotton's nonrenewal was unrelated to their performance. Both proffered and accepted testimony confirmed Gardner's statement.

Petitioners proffered crucial testimony by Thomas Devine, a national expert on whistleblowing who had testified in three prior whistleblowing cases. Devine would have testified regarding the pattern of retaliatory conspiracy in this case as compared to other whistleblowing cases. He would have explained that the conduct of respondents and King in this case was wholly consistent with the usual individual and institutional response to whistleblowers.[2] Persons criticized by a whistleblower do not themselves act directly. To avoid the appearance of retaliation, they choose an outside party to eliminate the whistleblower. That is precisely what happened in this case. As Ms.

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[2] The District Court excluded this expert testimony based upon its reading of Fed.R.Evid. 701, 702, and 703. In particular, Judge Paine believed that the requirements of Fed.R.Evid. 702 were not met, and that the subject matter of the testimony was not "scientific" enough to warrant expert testimony. *See* Part II, below.

Snyder testified, Respondents sought to develop a new written record -- a "paper trail" -- to explain their discharge of Cotton and Taylor. Devine also would have testified that time lags between the whistleblowing and the discharge of the whistleblower are more consistent than not with a retaliatory response.

Devine's proffered testimony would have demonstrated that Taylor's proposed transfer, and Cotton's negative reaction to it, were typical methods of retaliation against whistleblowers. Whistleblowers are regularly isolated, criticized or pushed in various ways to the point where they are so frustrated that they write inappropriate memoranda or try to embarrass a superior.

C. Course of Proceedings and Disposition in the Courts Below

On January 30, 1989, petitioners Taylor and Cotton filed their complaint in the United States District Court for the Southern District of Florida against respondents FAU, Popovich, Michels, Berry, Nicewander, Floyd, and Gardner, seeking declaratory and injunctive relief and compensatory and punitive damages. The complaint alleged that the individual respondents acted individually and in concert to fire Taylor and Cotton for exercising their First Amendment rights in criticizing respondents in their official capacity as University administrators.

Respondents generally denied the allegations in their answers. On October 29, 1990, Taylor and Cotton moved for partial summary judgment, and later filed a second motion for summary judgment. Several respondents subsequently filed motions for partial summary judgment.

On April 19, 1991, the district court granted partial summary judgment on various issues in favor of some of the parties and denied the remainder of the summary judgment motions, leaving those issues for trial. The case was tried to a jury, beginning on April 23, 1991.

Importantly, before trial, the district court found that several of petitioners' statements were protected by the First Amendment. Specifically the district court ruled that Taylor's comments to newspapers, to Investigator Valentine, and to Auditor Sweeney concerning procurement fraud at FAU were protected; that Cotton's comments to newspapers criticizing the FAU administration were protected; and that Cotton's nomination of Taylor for a Distinguished Service Award, and his public support of Taylor were protected.[3] *See* Omnibus Order on Motions for Directed Verdict, Appendix, 7a-15a.

During the jury trial, petitioners offered Thomas Devine as an expert on whistleblowing. However, the district court refused to allow Devine to testify based on its reading of the Federal Rules of Evidence. *See* Part II, below. At the jury charge conference, the district court rejected petitioners' objection to the portion of the court's charge that required proof of intent as an element of a claim

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[3] However, the district court also ruled that other communications from Taylor and Cotton were not protected, including Cotton's 20 Question Memorandum and various communications regarding petitioners' concerns about FAU's responses to their conduct and possible retaliation. Petitioners contend that this speech also was protected by the First Amendment.

under 42 U.S.C. § 1983. *See* Part I, below. The court also refused petitioner's instructions regarding innocent intermediary, the continuing nature of conspiracies, and respondents' burden to prove withdrawal from the conspiracy.

On May 13, 1991, the jury returned a verdict for respondents. The district court entered final judgment on May 18, 1991. Appendix, 3a. On May 23, 1991, Taylor filed a motion for a new trial or for judgment n.o.v. The court denied Taylor's motion on May 28, 1991 (entered June 7). On May 28, 1991, Taylor and Cotton filed a motion for rehearing or clarification. On June 14, 1991, Taylor and Cotton timely filed their first Notice of Appeal. On July 31, 1991, the district court entered an order denying petitioners' May 28 motion for rehearing or clarification. Cross-appeals by various respondents were filed on August 13. On August 22, 1991, Taylor and Cotton filed a second timely Notice of Appeal.

On September 29, 1992, the Eleventh Circuit, after hearing oral argument, affirmed the district court's judgment without opinion. Appendix, 1a.

REASONS FOR GRANTING THE WRIT

I. The Decisions Below Substantially Impair § 1983 Redress for Violations of First Amendment Rights by Improperly Interposing Intent as an Element of the Claim

Respondents argue that since Gardner, the person who issued the termination contracts to petitioners, had no "intent" to violate petitioners' constitutional rights, none of

the respondents can be culpable under 42 U.S.C. § 1983. They reason that since Gardner either did not know of the whistleblowing retaliatory conduct of other respondents (*i.e.*, was an innocent intermediary) or refused to hear of it (*i.e.*, was recklessly indifferent), his termination of petitioners could not have violated § 1983. They further theorize that the "intent" of the other respondents is irrelevant since Gardner's lack of "intent" essentially cleansed petitioners' termination of any taint. Apparently influenced by respondents' intentional conduct theory, the district court, over petitioners' vehement objections, instructed the jury on liability under 42 U.S.C. § 1983 as follows:

> The law provides that a person may sue in this Court for an award of money damages against anyone who, under color of state law or custom, *intentionally* violates the plaintiff's rights under the Constitution of the United States.

Appendix, 17a. The district court overruled petitioners' timely objection that neither § 1983 nor the First Amendment require plaintiff to prove that respondents *intended* to violate petitioners' rights. Thus, this case squarely presents the question whether only intentional conduct can support a § 1983 claim.

In *Parratt v. Taylor*, 451 U.S. 527 (1981), this Court, in discussing its prior § 1983 cases, found that "[n]othing in the language of § 1983 or its legislative history limits the statute solely to intentional deprivations of constitutional rights." 451 U.S. at 534. The *Parratt* Court noted that the statute does not contain a state of mind requirement and, accordingly, "'should be read against the

background of tort liability that makes a man responsible for the natural consequences of his action.'" *Parratt*, 451 U.S. at 535, *quoting Monroe v. Pape*, 365 U.S. 167, 187 (1961). Whether a § 1983 violation occurred depends on only two factors: (1) whether the conduct in question was committed by a person acting under color of state law; and (2) whether the conduct deprived a person of rights, privileges or immunities guaranteed by the Constitution or the laws of the United States. Thus, *Parratt* strongly implied, if it did not outright hold, that some degree of culpability less than intentional conduct can provide the basis for a § 1983 claim. *See also Gomez v. Toledo*, 446 U.S. 635, 639-40 (1980). Therefore, the district court committed a serious error of law in instructing the jury that § 1983 required proof of intent.

Nor does the First Amendment burden plaintiffs with proving intentional conduct. In *Mt. Healthy City School Dist. Board of Education v. Doyle*, 429 U.S. 274 (1977), this Court enunciated the analysis to be applied in First Amendment retaliatory employment action cases: (1) plaintiff must show that his conduct is protected by the First Amendment and that this protected conduct was a substantial or motivating factor behind the adverse action taken against him; (2) if plaintiff satisfies this burden, the defendant, to avoid liability, must prove by a preponderance of the evidence that it would have reached the same decision even in the absence of plaintiff's protected conduct.

Guided by *Parratt* and *Mt. Healthy*, several federal courts have held that even negligent impairment of First Amendment rights is actionable under § 1983. *See Foley v. Alabama State Bar*, 648 F.2d 355, 359-60 (5th Cir. 1981); *Lowe v. Letsinger*, 772 F.2d 308, 314 (7th Cir.

1985); *Boussom v. City of Elkhart*, 567 F.Supp. 1382, 1387 (N.D. Ind. 1983).

However, in *Daniels v. Williams*, 474 U.S. 327 (1986), a prisoner's case, this Court reconsidered whether "mere negligence" will support a claim under § 1983. This Court held:

> In *Parratt v. Taylor*, we granted certiorari . . ."to decide whether mere negligence will support a claim for relief under § 1983." 451 U.S., at 532. After examining the language, legislative history and prior interpretations of the statute, *we concluded that § 1983*, unlike its criminal counterpart, 18 U.S.C. § 242, *contains no state-of-mind requirement* independent of that necessary to state a violation of the underlying constitutional right. *Id.*, at 534-35. *We adhere to that conclusion.*

Daniels, 474 U.S. at 329-30 (emphasis added). However, the Court added: "[i]n any given § 1983 suit, the plaintiff must still prove a violation of the underlying constitutional right." *Id.*, at 330. The *Daniels* Court "overrule[d] *Parratt* to the extent that it states that mere lack of due care by a state official may 'deprive' an individual of life, liberty, or property under the Fourteenth Amendment." *Id.*, at 330-31.

Daniels has caused some uncertainty among the lower federal courts concerning whether and when less than intentional conduct states a cause of action under § 1983. In particular, in § 1983 cases seeking redress for violation of First Amendment rights, the lower federal courts are divided.

Some cases have emphatically insisted that after *Daniels*, a less than intentional First Amendment violation will still support a claim under § 1983. *E.g.*, *Caballero v. City of Concord*, 956 F.2d 204 (9th Cir. 1992) (emphatically holding that § 1983 *does not* require proof of intent and that *Daniels* has no application to cases involving abuse of government power); *Livesay v. Dawson*, No. 90-6647, 923 F.2d 848 (table) (unpublished decision; text reported in WESTLAW) (4th Cir. Jan. 25, 1991) (official's negligent action does not state a violation of due process after *Daniels*, but negligent violation of First Amendment right of access to courts is actionable under § 1983).

Other cases also hold that *Daniels* did not change the § 1983 burden regarding First Amendment claims, but state this proposition with less certainty. *E.g.*, *Walker v. Tennessee Dept. of Corrections*, No. 90-5075, 924 F.2d 1060 (table) (unpublished opinion; text reported in WESTLAW) (6th Cir. Jan. 31, 1991) (cautiously distinguishing the negligent due process claim in *Daniels* from a First Amendment claim).

At least one court has suggested that a First Amendment claim requires proof of an intent to deprive plaintiff of his constitutional rights. *Haynesworth v. Miller*, 820 F.2d 1245, 1262 n. 132 (D.C. Cir. 1987). That court stated that "establishment of a First Amendment claim of retaliatory prosecution requires proof that a governmental official acted with intent to deprive the plaintiff of his First Amendment right." *Id.* However, even that court quickly added: "But once such a violation is established, we think an official charged with supervising the wrongdoer may be held liable for dereliction of duty regardless of whether he harbored an improper motive of his own." *Id.*

Arguably, the district court's jury charge and the Eleventh Circuit's affirmance in this case are consistent with the first part of the *Haynesworth* ruling that intent by an official is required to prevail on a First Amendment claim under § 1983. Yet, the charge is inconsistent with the *Haynesworth* recognition that other defendants may be liable who *do not* have an improper motive, as well as with the case law requiring no proof of intent.

This Court should grant this petition to decide the question definitively. This Court consistently has recognized that the First Amendment free speech guarantee is one of the most basic of the fundamental rights guaranteed by the Constitution. *See Bose Corp. v. Consumers Union of the United States, Inc.*, 466 U.S. 485, 503-04 (1984); *Cohen v. California*, 403 U.S. 15 (1971); *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964). The Court has condemned conduct that promotes concealment of governmental wrongdoing and that has a "chilling effect" on the exercise of free speech aimed at uncovering that wrongdoing:

> The dominant purpose of the First Amendment was to prohibit the widespread practice of governmental suppression of embarrassing information.
>
> * * *
>
> Secrecy in government is fundamentally anti-democratic, perpetuating bureaucratic errors. Open debate and discussion of public issues are vital to our national health.

New York Times Co. v. United States, 403 U.S. 713, 723-24 (1971). In protecting this fundamental free speech right,

this Court has relaxed the standing requirement, *e.g.*, *Board of Trustees of the State University of New York v. Fox*, 492 U.S. 469, 483-85 (1989), and broadened the standard of review, *see Bose*, 466 U.S. at 499, 505-11, to assure a full, independent review of conduct alleged to have violated, or even threatened to have violated, this most basic of fundamental rights.

This case clearly involves speech that is protected by the First Amendment. Though it erred in finding some of petitioners' statements unprotected, the district court also specifically and correctly ruled that several statements made by Taylor and Cotton were protected by the First Amendment. This protected-speech finding was not challenged by respondents in the court of appeals.

The intentional standard of proof, such as suggested in *Haynesworth* and required by the jury instruction given in this case, is incorrect and inconsistent with this Court's First Amendment and § 1983 jurisprudence. It misdirected the jury's evaluation of respondents' reckless conduct in violation of petitioners' free speech rights. First, this Court's established case law, as discussed above, specifically provides that § 1983 contains no state of mind requirement. Thus, to tell a jury, as the district court did in this case, that under § 1983, a plaintiff must prove that defendant *intentionally* violated plaintiff's constitutional rights, is blatantly incorrect and erroneous. Second, that jury instruction cannot be defended by an assertion that the First Amendment requires proof of intent. This Court has never held that the First Amendment requires proof of intent. *Mt. Healthy*, discussed above. Nothing in *Daniels* or any other Supreme Court case, either expressly or implicitly, has added an intent requirement to the *Mt. Healthy* standard.

The split in the case law among the circuits should be resolved to make this clear.

Furthermore, imposing such a requirement would restrict freedom of speech and impose a "chilling effect" on the exercise of First Amendment rights. Few employers are brazen enough to proffer an intentional First Amendment violation as the reason for their adverse employment actions. Proof of a First Amendment violation is difficult at best, often depending upon circumstantial evidence, and the jury's evaluation of that evidence. Adding an intentional conduct element to the established First Amendment standard would further impair an aggrieved plaintiff's rights and "chill" his ability to speak freely concerning matters of public importance, such as the misspending of public funds. Imposing an intent requirement would sanction negligence-based explanations as an excuse for unconstitutional conduct. It would turn clear constitutional violations into unactionable decisions.

The lower court's incorrect decision of this issue also materially impacts the outcome of this case. By charging the jury that § 1983 requires proof of intent, the district court precluded the jury from lawfully evaluating petitioners' claim. Furthermore, by combining this § 1983 intent charge with the district court's refusal to give other requested charges -- on the defendants' burden to prove withdrawal from the conspiracy, the continuing nature of the conspiracy, and the conspiracy acting through an innocent intermediary -- that court all but directed a verdict for respondents.

For example, respondent Gardner, subsequently hired as the direct supervisor of petitioners, recklessly carried out

the execution order that retaliated against petitioners. Under an intentional conduct standard, the fact finder is precluded from determining whether he was liable to petitioners under § 1983 for recklessly and callously failing to investigate *why* his superiors wanted him to fire petitioners. Similarly, respondents Popovich (FAU's President), Nicewander (FAU's Vice-President of Administrative Affairs), and Michels (FAU's Provost) could have been held responsible under a lesser standard, because all three of these respondents recklessly conspired to terminate plaintiff. All three recklessly failed to supervise King, petitioners' supervisor before Gardner, regarding the false paper trail of "poor" performance. Likewise, President Popovich recklessly failed to supervise Gardner, who terminated petitioners. *Cf. City of Canton v. Harris*, 489 U.S. 378 (1989) (applying a callous indifference standard in a § 1983 supervisory case). Respondent Floyd, in interviewing Gardner, recklessly suggested that petitioners were personnel problems. Under the intentional conduct standard that the district court applied in this case, the jury was precluded from evaluating substantial reckless, callous, indifferent, or negligent conduct taken to the prejudice of petitioners' fundamental free speech rights. The jury's consideration of the case in light of the court's erroneous charge requires a new trial in this case. *See, e.g., Somer v. Johnson*, 704 F.2d 1473, 1477-78 (11th Cir. 1983).

This case presents an important question of federal civil rights law that materially impacts on fundamental First Amendment rights. The circuits are divided on the question and require the guidance of this Court. Petitioners submit that the Court should grant this petition to consider the question. Petitioners further suggest that the fundamental nature of the rights guaranteed by the First Amendment

mandates that the Court hold that plaintiffs bringing § 1983 First Amendment claims are not bound to prove that the defendant's adverse action was *intentionally* directed at violating their rights.

II. The Evidentiary Rulings Below Improperly Prohibit the Use of Expert Witnesses in Establishing Patterns and Practices of Retaliation in § 1983 Retaliatory Discharge Cases

Petitioners sought to introduce the testimony of Thomas Devine, a nationally prominent expert on whistleblowing and retaliation against whistleblowers, who had testified as such in previous cases. His testimony would have provided the jury with a description of the common methods used by employers to retaliate surreptitiously against whistleblowers. In prohibiting Mr. Devine from testifying, the district court stated:

> [W]hat is being proposed here is that the witness will present the plaintiffs' argument in an evidentiary posture. He is going to explore other cases, and how they are similar, and come up with a conclusion that this is a classic case of whistleblowing, and I don't think that is what is contemplated by Federal Rules of Evidence 701, 702, 703 and 704. . . .

Appendix, 22a. The district court further opined:

> *It doesn't seem to me that the subject matter is so scientific* as to require expert testimony, and I don't believe there is any difficulty in presenting this

> argument to the jury. . . . and I don't think that the requirements of Rule 702 are met.

Id. (emphasis added). Thus, the court ruled that the use of an expert to establish the common "modus operandi" of retaliation for the exercise of First Amendment free speech rights is outside the scope of the Federal Rules of Evidence, because such testimony is not sufficiently "scientific" to come within the scope of the rule. The Eleventh Circuit, apparently agreeing with the district court, affirmed the trial court's ruling without opinion.

Because such "pattern and practices" expert witnesses are crucial in establishing retaliation practices in a wide range of § 1983 cases, this Court, as supervisor of the federal courts and promulgator of the Federal Rules, should grant the petition to clarify the application of Fed.R.Evid. 702 and 704.

The Advisory Committee Notes to Rule 702 plainly state that the test is whether use of the expert will assist the trier of fact as a result:

> The rule is broadly phrased. *The fields of knowledge which may be drawn upon are not limited merely to the "scientific" and "technical" but extend to all "specialized" knowledge.* Similarly, the expert is viewed, not in the narrow sense, but as a person qualified by "knowledge, skill, experience, training or education."

Fed.R.Evid 702 advisory committee's notes (emphasis added).

Furthermore, the advisory committee notes have recognized the need for experts in cases like this case: "An intelligent evaluation of the facts is often difficult or impossible without the application of some scientific, technical, or *other specialized* knowledge." *Id.* (emphasis supplied).

In advancing the broad scope intended for Rule 702, courts generally have allowed a broad array of experts to testify, particularly in the context of establishing a "pattern and practice" or the "modus operandi" of illegal conduct. *Robinson v. Jacksonville Shipyards, Inc.*, 760 F.Supp. 1486, 1502, 1505-06 (M.D. Fla. 1991) (authorizing experts to testify concerning sexual stereotyping and harassment); *see also United States v. Dunn*, 846 F.2d 761, 763 (D.C. Cir. 1988) ("Federal courts often permit experts to testify on narcotics operations because jurors are commonly unfamiliar with the methods by which drug dealers attempt to conceal their activities"); *United States v. Johnson*, 735 F.2d 1200, 1202 (9th Cir. 1984) (authorizing law enforcement officers to testify concerning the "techniques and methods" used by criminals as "[s]uch evidence helps the jury to understand complex criminal activities, and alerts it to the possibility that combinations of seemingly innocuous events may indicate criminal behavior"); *Vucinich v. Paine, Webber, Jackson & Curtis*, 803 F.2d 454, 461 (9th Cir. 1986) (reversing the district court's refusal to allow an expert on the securities business to testify regarding trade standards); *Samples v. City of Atlanta*, 916 F.2d 1548, 1551 (11th Cir. 1990) (sustaining the testimony of a "use of force" expert in a civil rights action against police officers). Doubts regarding the admissibility of an expert's testimony should be resolved in

favor of allowing the expert to testify. 3 J. Weinstein & M. Berger, EVIDENCE ¶ 702[02], 702-30 (1982).

Also, Fed.R.Evid. 704 broadly defines the scope of an expert's testimony so as to include the ultimate issue to be decided by the trier of fact. Indeed, the Advisory Committee Notes to Rule 704 make clear that the rule specifically abolished the prior rule, which prohibited experts from testifying concerning the ultimate issue. Consistent with the Advisory Committee notes, this Court has recognized in *dicta* that "Rules 702-705 permit experts to testify in the form of an opinion, and without any exclusion of opinions on 'ultimate issues.'" *Beech Aircraft Corp. v. Rainey*, 488 U.S. 153, 169 (1988). Addressing the admissibility of opinions or conclusions in official reports under Fed.R.Evid. 803(8)(C), this Court found that the thrust of the Federal Rules of Evidence was to relax "the traditional barriers to 'opinion' testimony." *Id.*; Cf. *Barefoot v. Estelle*, 463 U.S. 880, 898-99 (1983) (approving expert testimony regarding the ultimate issue of the "future dangerousness" of a criminal defendant).

The decisions below directly conflict with Rules 702 and 704. Rule 702 allows the testimony of "pattern and practice" experts, even though such testimony may not be "scientific." As authorized by the Advisory Committee Notes, plaintiffs' expert sought to discuss the commonly recognized characteristics of institutional reaction to whistleblowing and to apply them to the evidence in this case. Just as expert testimony was needed to establish the characteristics of illegal narcotics activity (*Dunn*, cited above), seemingly innocuous criminal activity (*U.S. v. Johnson*, cited above), illegal securities practices (*Vucinich*, cited above), or sexual harassment practices (*Robinson*,

cited above), such testimony is essential to establishing the common techniques used by employers to conceal their illegal motives in terminating whistleblowers. The characteristics of institutional reaction to whistleblowing are not intuitively obvious, so Devine's recognized expertise was crucial to assist the jury "to understand the evidence." Because the rulings below substantially and impermissibly narrowed the scope and extent of expert testimony allowed under the Federal Rules of Evidence, this Court should grant this petition.

Moreover, proper supervision of the federal courts and correct interpretation of the rules of evidence are not the sole concerns here. In this case, the district court's erroneous reading of the Federal Rules of Evidence undercut the First Amendment free speech guarantee. An interpretation of Fed.R.Evid. 702 and 704 that prohibits expert testimony on whistleblower retaliation practices, particularly when combined with an erroneous intentional conduct burden of proof, *see* Part I, above, effectively legalizes retaliatory employment actions against those exercising their free speech rights. In order to prevail in a § 1983 retaliatory discharge case, a plaintiff must prove that his discharge from employment resulted from the exercise of his constitutional rights. *See* Part I, above. Without an expert's testimony concerning the common characteristics of such conduct, this burden is almost impossible to meet in the face of a complex public employer conspiracy. The jury is left without guidance in evaluating whether the facts proven by plaintiff, some seemingly insignificant on their face, demonstrate a pattern or practice of retaliatory conduct. The result is that free speech is impaired -- to the public detriment -- because public employees with knowledge of wrongdoing, such as Taylor and Cotton, will

refuse to come forward to expose government corruption for fear of retaliation by their public employers.

Only rarely has this Court addressed the Federal Rules of Evidence. However, petitioners submit that the importance of the district court's erroneous evidentiary ruling, particularly considering its impact on fundamental First Amendment rights, merits granting the petition here.

CONCLUSION

For the foregoing reasons, petitioners Robert Taylor and Timothy Cotton submit that this Court should grant their petition to issue a writ of certiorari to the Eleventh Circuit.

Respectfully submitted,

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Counsel for Petitioners

**Counsel of Record*

APPENDIX

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

NO. 91-5668

[Stamped: Filed SEP 29 1992]

D. C. Docket No. 89-8046-CIV-JCP

ROBERT TAYLOR and TIMOTHY COTTON,
Plaintiffs-Appellants,
Cross-Appellees,

versus

HELEN POPOVICH, KENNETH MICHELS, DENNIS NICEWANDER, DON GARDNER, MARILYN FLOYD, LEONARD BERRY,
Defendants-Appellees,
Cross-Appellants,

FLORIDA ATLANTIC UNIVERSITY, ANTHONY CATANESE,
Defendants-Appellees.

Appeals from the United States District Court
for the Southern District of Florida

(September 29, 1992)

Before DUBINA and BLACK, Circuit Judges, and HENDERSON, Senior Circuit Judge.

PER CURIAM:

AFFIRMED. See 11th Cir. R. 36-1.

Costs are taxed against plaintiffs-appellants, cross-appellees.

Entered: September 29, 1992
For the Court: Miguel J. Cortez, Clerk

By: Karleen McNabb [signature]
Deputy Clerk

ISSUED AS MANDATE: NOV 4 1992

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 89-8046-CIV-PAINE

ROBERT TAYLOR and
TIMOTHY COTTON
Plaintiffs,

vs. [Stamped: Filed May 17, 1991]

FLORIDA ATLANTIC UNIVERSITY,
HELEN POPOVICH, KENNETH MICHELS,
DENNIS NICEWANDER, DON GARDNER,
MARILYN FLOYD, LEONARD BERRY,
and ANTHONY CATANESE,
Defendants.

_____/

FINAL JUDGMENT

This action came on for trial before the court and a jury, Honorable James C. Paine, District Judge, presiding, and the issues having been duly tried, the jury having rendered its verdict, and the Court having entered its Final Order.

It is Ordered and Adjudged that the Plaintiffs, ROBERT TAYLOR and TIMOTHY COTTON, take nothing from this action and the Defendants, FLORIDA ATLANTIC UNIVERSITY, HELEN POPOVICH,

KENNETH MICHELS, DENNIS NICEWANDER, DON GARDNER, MARILYN FLOYD, LEONARD BERRY, and ANTHONY CATANESE, go hence without day.

Dated at West Palm Beach, Florida, this 17th day of May, 1991.

T.G. CHELEOTIS, CLERK OF COURT
By: Svava Ringheim (signature)

[Stamped
Certified to be a true
and correct copy of the original.
T.G. Cheleotis, Clerk
U.S. District Court
Southern District of Florida
By Svava Ringheim (signature)
Deputy Clerk
Date May 17 1991]

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 89-8046-CIV-PAINE

ROBERT TAYLOR and
TIMOTHY COTTON
Plaintiffs,
vs. [Stamped: May 17 1991]

FLORIDA ATLANTIC UNIVERSITY,
HELEN POPOVICH, KENNETH MICHELS,
DENNIS NICEWANDER, DON GARDNER,
MARILYN FLOYD, LEONARD BERRY,
and ANTHONY CATANESE,
Defendants.
_____/

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Findings

The jury has determined that the exercise of constitutional rights to free speech was not a substantial or motivating factor in the decisions to issue nonrenewal contracts to Plaintiffs ROBERT TAYLOR and TIMOTHY COTTON. No award of compensatory damages for mental and emotional distress or lost past or future earnings, or punitive damages, was made. Consistent with the jury's verdict, the Court finds no basis for reinstatement of either Plaintiff to his former position at FLORIDA ATLANTIC UNIVERSITY ("FAU"), or, alternatively, payment for lost future earning capacity. Reinstatement would be

unreasonably harmful and prejudicial to the relationship of the FAU administration to its employees. Further, the Court finds no need for an injunction prohibiting future retaliatory conduct.

Conclusions

1. The Plaintiffs shall take nothing by this action.

2. The Court shall reserve jurisdiction as to the issues of taxable costs and attorneys' fees.

3. The Clerk of Court shall enter Final Judgment in accordance with this Order.

DONE and ORDERED in West Palm Beach, Florida, this 17th day of May, 1991.

James C. Paine (signature)
UNITED STATES DISTRICT JUDGE

Copies furnished:
James Green, Esq.
Richard Lubin, Esq.
Trent Steele, Esq.
James Williams, Esq.
Michael Petrucelli, Esq.
Steven Stinson, Esq.
Stephen Radford, Esq.
Gary Isaacs, Esq.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 89-8046-CIV-PAINE

ROBERT TAYLOR and
TIMOTHY COTTON
Plaintiffs,

vs.

FLORIDA ATLANTIC UNIVERSITY,

HELEN POPOVICH, KENNETH MICHELS, DENNIS NICEWANDER, DON GARDNER, MARILYN FLOYD, and LEONARD BERRY,
Defendants.
_____/

OMNIBUS ORDER ON MOTIONS FOR DIRECTED VERDICT

This matter came to be heard on the parties' Motions for Directed Verdict at the close of trial.

PETITION

Plaintiff COTTON has termed his nomination of Plaintiff TAYLOR for a Distinguished Service Award a "petition to a government official," protected by the Constitution. The First Amendment grants a right to "petition the Government for a redress of grievances." U.S. Const. amend. I (emphasis added). It is unclear what

grievance COTTON sought to redress through his nomination. The lone case cited by the Plaintiffs, Cate v. Oldham, 707 F.2d 1176 (11th Cir. 1983), concerned a lawsuit filed against the State of Florida and a State official, and sheds no light upon the instant case.

Moreover, this theory was not raised in the Second Amended Complaint, but was first mentioned in the Plaintiffs' Memorandum in Opposition to Defendants' Motions for Summary Judgment. An opposition memorandum is not the appropriate vehicle through which to raise new theories of action.

In sum, COTTON's nomination does not fall within the petition clause, both rather is best viewed as speech.

ASSOCIATION

Similarly, the evidence does not indicate that Plaintiff COTTON was engaged in any conduct that could invoke the right of association. Courts refer to a constitutionally protected "freedom of association" in two distinct senses. The first is "intimate association," protecting "choices to enter into and maintain certain intimate human relationships." The second is "expressive association," whereby individuals band together to express views protected by the First Amendment - such as speech and freedom or religion. City of Dallas v. Stanglin, --- U.S. ---, 109 S.Ct. 1591, 1594-95 (1989); Roberts v. United States Jaycees, 468 U.S. 609, 618-22 (1984). Contrary to COTTON's argument, the Supreme Court has expressly held that the Constitution does not recognize a generalized right of "social association." Stanglin, 109 S.Ct. at 1595.

While this Court has previously noted that terminations based upon an employee's association with another may be actionable, no facts adduced at trial suggest that the relationship between COTTON and TAYLOR falls within either constitutionally recognized form of association. In Wilson v. Taylor, 733 F.2d 1539 (11th Cir. 1984), a police officer's termination was improperly motivated by his dating the daughter of a convicted felon. COTTON, however, was not engaged in such an intimate relationship with TAYLOR. Moreover, the evidence that COTTON spoke out in support of TAYLOR does not constitute the type of group action that underlies the right of expressive association. There is no evidence that these Plaintiffs formally banded together, agreed to a common goal or agenda, or coordinated their speech toward some end. Compare Hinkle v. Christensen, 733 F.2d 74 (8th Cir. 1984) (union activities).

To the extent that the issuance of a nonrenewal contract to COTTON was based upon his public support of TAYLOR, COTTON has rights grounded in the First Amendment. But the correlative right of association is not implicated, and a verdict is directed in the Defendants' favor on this issue.

PROTECTED SPEECH

The Court agrees that it must make an initial ruling, pursuant to Connick v. Myers and its progeny, as to which, if any, categories of speech are protected by the First Amendment. The Court must first determine whether the speech may be "fairly characterized as constituting speech on a matter of public concern." Connick, 461 U.S. 138, 146. If the speech is purely private, then no protection attaches

If the speech concerns public matters, the Court must then apply the Pickering balancing test, weighing the employee's First Amendment interests against "the interest of the state, of an employer, in promoting the efficiency of the public services it performs through its employees." Under both prongs of this analysis, "the context circumstances of the employee's speech must be considered." Bryson v. City of Waycross, 888 F. 2d 1562, 1565 (11th Cir. 1989).

The Plaintiffs have designated ten separate categories of speech, which this Court will analyze individually:

1,3,4. TAYLOR'S comments to newspapers, the State Attorney's Office, and Mr. Sweeney. Speech that "seek[s] to bring to light actual or potential wrongdoing or breach of [the] public trust" touches upon matters of public concern. Connick v. Myers, 461 U.S. 138, 148 (1983). TAYLOR's speech concerning procurement fraud at FAU clearly meets this definition. Because a public employer has no legitimate interest in retaliating against whistleblowers, this speech passes the Pickering balancing test as well. See, e.g., Porter v. Califano, 592 F.2d 770, 773-74 (5th Cir. 1979) (disruption caused by the whistleblowing does not authorize termination).

2. COTTON's comments to newspapers. COTTON was quoted in several newspaper articles criticizing the FAU administration's lack of interest in the Broward Tower facility. Because this speech relates to the wisdom or efficiency of FAU's operations, it may be fairly characterized a speech on a matter of public concern; the fact that the newspaper printed his statements is evidence of their public nature. Applying the balancing test, the Court notes that no evidence was introduced to prove that

COTTON's comments to newspapers hindered his own performance, that of his coworkers, or his inter-office working relationships. Moreover, a college atmosphere is one that should be unusually tolerant of any expression, including criticism of the administration. See Trotman v. Bd. of Trustees of Lincoln Univ., 635 F.2d 216, 230 (3d Cir. 1980). For these reasons, the Court holds that this category of speech is protected.

5,6. COTTON's nomination and public support of TAYLOR. The Court has previously explained that nominating TAYLOR for a Distinguished Service Award was speech, not a petition to the government. Defendants have argued that, because the nomination was communicated within the university, the speech is wholly private. But freedom of speech is not lost by the employee who chooses to communicate public views through private channels. Givhan v. Western Line Consolidated School Dist., 439 U.S. 410 (1979). Under the Connick analysis, open support of a known whistleblower touches upon a matter of public concern. And, just as a public employer has no legitimate interest in terminating a whistleblower, neither can he terminate those who have publicly supported the whistleblower. COTTON's speech in this regard is protected.

7,8,9. Subsequent communications regarding perceived retaliation. After the whistleblowing but before the issuance of nonrenewal contracts, TAYLOR and COTTON engaged in oral and written communications wherein they expressed a concern that TAYLOR was being retaliated against. The Plaintiffs seek to characterize these statements of concern as protected speech activity. This argument is flawed in three key respects. First, statements

of concern over personal job security are private in nature. See Connick, 461 U.S. at 147-49. Second, these statements occurred long after the alleged conspiracy to fire TAYLOR and COTTON was formed in 1986; stated differently, there exists no causal connection between the Plaintiffs' Second Amended Complaint does not predicate liability under Section 1983 upon the subsequent communications. While certain actions in 1986 might be evidence of a pre-existing scheme to retaliate. Third, the Plaintiffs' Second Amended Complaint does not predicate liability under Section 1983 upon the subsequent communications. While certain actions in 1986 might be evidence of a pre-existing scheme to retaliate against TAYLOR and COTTON, these communications do not constitute independently protected speech.

10. The "Twenty Questions" Memo. Although they have now apparently conceded the point, the Plaintiffs initially argued that a memorandum from COTTON to Defendant GARDNER, which COTTON himself acknowledged was ill-advised, is speech protected by the First Amendment. Under this argument, had GARDNER issued a renewal contract based solely upon the content of the Twenty Questions Memo, COTTON would have a cause of action under Section 1983. The Court strongly disagrees. Not only is the subject matter of the Twenty Questions Memo wholly private, but it cannot pass the Pickering balancing test. The memorandum is "rude and insulting" in tone, and would clearly affect GARDNER's "need to maintain loyalty, discipline and good working relationships among those he supervises." Dartland v. Metro. Dade County, 5 F.L.W. Fed. D147 (S.D. Fla. March 29, 1991). Finally, the Twenty Questions Memo was not raised in the Second Amended Complaint.

GARDNER

Defendant GARDNER claims entitlement to a directed verdict because he testified that he was not improperly motivated in recommending that TAYLOR and COTTON be terminated. The Court has previously determined that circumstantial evidence adduced during the Plaintiffs' case-in-chief created a jury question as to his motivations. His testimony, which may be rejected as not credible, does not change this analysis.

DEPRIVATION VS. CONSPIRACY

The alleged act by which each Plaintiff was deprived of his constitutional rights was the issuance of nonrenewal contracts. The evidence indicates that the nonrenewal contracts were recommended by Defendant GARDNER, approved by Defendant POPOVICH, and signed by George Perkins. Thus, the only name Defendants who could fairly be said to have participated, either directly or indirectly, in the issuance of nonrenewal contracts are GARDNER and POPOVICH. The Court hereby directs a verdict in favor of MICHELS, NICEWANDER, FEDERICO, and BERRY on the issue of actual deprivation.

These Defendants remain, of course, potentially liable for conspiracy to deprive constitutional rights. Conspiracy is, in fact, "the legal mechanism through which to impose liability on each and all the defendants without regard to the person doing the particular act." Jones v. Bales, 58 F.R.D. 453, 458 (N.D.Ga. 1982), aff'd, 480 F.2d 805 (5th Cir. 1973) (per curiam).

As the MICHELS' claim that he was not a state actor, the Court responds that he was still employed at FAU during the cabinet meetings wherein retaliation was allegedly discussed. Furthermore, a private party engaging in joint action with state officials acts with color of state law. Dennis v. Sparks, 449 U.S. 24, 28 (1980).

RECOMMENDATION

Defendant GARDNER has cited Hughes v. Halifax, 855 F.2d 183, 186 n.4 (4th Cir. 1988) for the proposition that, by merely recommending that TAYLOR and COTTON be terminated, he did not participate in a deprivation of rights. The act of recommendation may, however, set in motion a series of reactions that the actor knows will ultimately inflict constitutional injuries on third parties. Johnson v. Duffy, 588 F.2d 740, 743 (9th Cir. 1978). Thus, a party who recommends termination may be liable under Section 1983. Darnell v. Ford, 903 F.2d 556, 562 (8th Cir. 1990); Wulf v. City of Wichita, 883 F.2d 842, 862-63 (10th Cir. 1989).

QUALIFIED IMMUNITY

As the Court has previously held, the law is clearly established that a public employer cannot retaliate against his employee's exercise of First Amendment rights. Stewart v. Baldwin County Bd. of Educ., 908 F.2d 1499, 1505 (11th Cir. 1990). The applicability of a qualified immunity defense, therefore, depends upon resolution of a factual question: were the Defendants' actions improperly motivated? Ansley v. Heinrich, 925 F.2d 1339, 1346-48 (11th Cir. 1991). In this regard, the defense rises or falls with the liability issues. Directed verdict is inappropriate.

While the jury must decide the liability issues, they should not be instructed on the qualified immunity defense, which is, ultimately, a question of law for the Court. Ansley, 925 F.2d at 1348.

FUTURE DAMAGES

The Defendants contend that the Plaintiffs' own expert acknowledged that TAYLOR and COTTON have suffered no loss of future earning capacity. To the contrary, the expert did assign a monetary value to the Plaintiffs' future damages. It is for the jury to decide whether this value is reasonable.

PUNITIVE DAMAGES

The Court has held that there is sufficient evidence to create a jury question as to each Defendant whether he or she participated in a scheme to deprive the Plaintiffs' constitutional rights. While a finding of liability does not mandate a punitive damage award, intentional deprivation and/or a conspiracy to deprive rights is an adequate predicate for punitive damages. This issue must go to the jury.

DONE and ORDERED in West Palm Beach, Florida, this 10th day of May, 1991.

James C. Paine (signature)
UNITED STATES DISTRICT JUDGE

Copies furnished:
counsel of record

Excerpt from District Court's Jury Charge

[BY THE COURT:]

Please note that, although Florida Atlantic University and its current president, Anthony Cantonese, have been named defendants, any claims relating to these defendants will be decided solely by the Court. Your assistance will not be required.

In this case plaintiffs Taylor and Cotton each claim that defendants Gardner and Popovich, while acting under color of state law, intentionally deprived him of his constitutional rights under the Constitution of the United States. Specifically, each plaintiff claims that while defendants Gardner and Popovich were acting under color of authority of Florida Atlantic University they intentionally violated that plaintiffs' constitutional rights; namely, that they were deprived of their rights under the First and Fourteenth Amendments of the Constitution when Gardner recommended and Popovich approved that Cotton and Taylor be issued nonrenewal or terminal contracts because of these plaintiffs' exercise of their rights of free speech.

Under the First and Fourteenth Amendments of the Constitution of the United States, every citizen has the right to freedom of speech, which includes the right to speak about matters of public concern. No public employer may terminate an employee for exercising that right.

For purposes of this case, you are instructed that the following acts of speech, and no others, are constitutionally protected. First, plaintiff Taylor's comments to newspapers, the State Attorney's Office and Mr. Sweeney; second,

plaintiff Cotton's comments to newspapers; and third, Cotton's nomination and public support of Taylor.

The law provides that a person may sue in this Court for an award of money damages against anyone who, under color of any state law or custom, intentionally violates the plaintiff's rights under the Constitution of the United States.

In order to provide their claims against an individual defendant, therefore, each plaintiff must prove by a preponderance of the evidence each of the following facts: First, that the acts of the defendant were under color or authority of the State of Florida; second, that the plaintiff's exercise of his protected First Amendment rights was a substantial or motivating factor in the defendant's participation in a decision to issue nonrenewal contracts to the plaintiff; and third, that the defendant's acts were the proximate or legal cause or damages sustained by the plaintiffs.

In this case the parties have stipulated or agreed that the defendants Gardner and Popovich acted under color of state law and you should, therefore, accept that fact as proven.

In order to prove that his speech activities were a substantial or motivating factor in defendant Gardner's decision to recommend or defendant Popovich's decision to approve that a nonrenewal contract be issued, a plaintiff does not have to prove that the protected speech activities were the only reason the defendants acted against him. It is sufficient if the plaintiff proves that his protected speech activities were a substantial consideration that made a difference in the defendant's decision.

Finally, for a defendant's acts to be the proximate or legal cause of damages it must be shown that, except for such conduct, the damages would not have occurred. Causation can be established by direct personal participation or by participation in setting in motion a series of acts by others which the actor knew or reasonably should have known would cause others to inflict constitutional injuries to third parties.

If you find in each plaintiff's favor with respect to each of the things he must prove you must then decide whether the defendants have shown by a preponderance of the evidence that the plaintiff would have been issued a nonrenewal contract for other reasons, even in the absence of the protected speech activity. If you find that the plaintiff would have been issued a nonrenewal contract for reasons apart from the speech activity then your verdict should be for the defendants.

If you find in either plaintiff's favor with respect to each of the things he must prove as to either defendant and further find that a defendant has not proven that the plaintiff would have issued a nonrenewal contract for other reasons then the defendant has deprived the plaintiff of his constitutional rights and you must next consider the claim of conspiracy. Otherwise, the plaintiff has not deprived, has not been deprived of his constitutional rights, and you need not consider the claim of conspiracy, because where there has been no deprivation of constitutional rights, there can be no liability for conspiracy.

Each plaintiff has claimed that defendants Gardner, Popovich, Michels, Nicewander, Federico and Berry

participated in a conspiracy to deprive his right to free speech. In order to prove this claim, each plaintiff must prove by preponderance of the evidence each of the following facts: First, that there existed a conspiracy; second, that the purpose of the conspiracy was to deprive the plaintiff of his constitutional right to free speech by issuing him a nonrenewal contract.

A conspiracy is a combination of two or more persons by concerted action to accomplish some unlawful purpose or to accomplish some lawful purpose by unlawful means. So a conspiracy is a kind of partnership in which each member becomes the agent of every other member. The essence of a conspiracy is a combination or agreement to violate or disregard the law.

Mere similarity of conduct among various persons and the fact that they may have associated with each other and may have assembled together and may have discussed some common aims and interests is not necessarily proof of the existence of a conspiracy.

However, the evidence in the case need not show that the members entered into any express or formal agreement of that they directly, by words spoken or in writing, stated between themselves what their object or purpose was to be or the details thereof or the means by which the object or purposes were to be accomplished. In order to establish that a conspiracy existed, the plaintiff must show that members of the conspiracy in some way or manner or through some contrivance, positively or tacitly, came to a mutual understanding to try to accomplish a common and unlawful plan.

The evidence in the case need not show that all the means or methods employed to carry out the alleged conspiracy were agreed upon, nor that all means or methods which were agreed upon were actually used or put into operation, nor that all persons alleged to have been members of the claimed conspiracy were members of such conspiracy.

In this suit each plaintiff alleges that the defendants Gardner, Popovich, Michels, Nicewander, Federico and Berry are co-conspirators. There can be no conspiracy unless one, unless more than one person is involved but it may be that not all the persons charged with being conspirators are, in fact, conspirators. In order to succeed a plaintiff does not have to show you that every one of the named defendants joined in the conspiracy, but he does have to show that at least one of those named defendants conspired with at least on other named defendant.

One may become a member of a conspiracy without full knowledge of all of the details of the conspiracy. On the other hand, a person who has no knowledge of a conspiracy but who happens to act in a way which furthers some object or purpose of the conspiracy does not thereby become a conspirator.

* * *

District Court's Ruling on Plaintiffs' Objection to Intentional Conduct § 1983 Charge

[BY THE COURT:]

Now, the use of the word "intentionally' at page 10 of the proposed instructions is taken from the Eleventh Circuit pattern. It's my view that this word properly describes an element of the cause of action which must be proved, so I intend to leave that word in there.

District Court's Ruling on Proffered Testimony of Expert Devine

[BY THE COURT:]

Well, it looks to me from the proffer like what is being proposed here is that this witness will present the plaintiffs' argument in an evidentiary posture. He is going to explore other cases, and how they are similar, and come up with a conclusion that this is a classic case of whistleblowing, and I don't think that is what is contemplated by Federal Rules of Evidence 701, 702, 703 and 704, which treat the matter of presentation of expert testimony, and on the basis of what is said in those rules, and also the authorities which have been furnished to me by you gentlemen, including the Cross case, which is in slip opinion now, and Pat just handed it to me here, that case doesn't throw a whole lot of light on what we can do. It does simply say in the appropriate head note, we have wide descretion [sic] in determining whether we should exclude such testimony, and the action will sustain unless it is manifestly erroneous.

I will exercise that descretion [sic], and grant the motion in limine as to the testimony of this witness. It doesn't seem to me that the subject matter is so scientific as to require expert testimony, and I don't believe there is any difficulty in presenting this argument to the jury which is what this witness will do according to the way his testimony has been proffered, and I don't think that the requirements particularly of Rule 702 are met.

So the motion in limine is granted.

U.S. CONSTITUTION, AMEND. I

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press, or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

U.S. CONSTITUTION, AMEND. XIV, § 1

All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

42 U.S.C. § 1983

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia

shall be considered to be a statute of the District of Columbia.

Federal Rule of Evidence 701:
Opinion Testimony by Lay Witnesses

If the witness is not testifying as an expert, the witness' testimony in the form of opinions or inferences is limited to those opinions or inferences which are (a) rationally based on the perception of the witness and (b) helpful to a clear understanding of the witness' testimony or the determination of a fact in issue.

Federal Rule of Evidence 702:
Testimony by Experts

If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise.

Federal Rule of Evidence 703:
Bases of Opinion Testimony by Experts

The facts or data in the particular case upon which an expert bases an opinion or inference may be those perceived by or made known to the expert at or before the hearing. If of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon

the subject, the facts or data need not be admissible in evidence.

Federal Rule of Evidence 704:
Opinion on Ultimate Issue

(a) Except as provided in subdivision (b), testimony in the form of an opinion or inference otherwise admissible is not objectionable because it embraces an ultimate issue to be decided by the trier of fact.

(b) No expert witness testifying with respect to the mental state or condition of a defendant in a criminal case may state an opinion or inference as to whether the defendant did or did not have the mental state or condition constituting an element of the crime charged or of a defense thereto. Such ultimate issues are matters for the trier of fact alone.

Federal Rule of Evidence 705:
Disclosure of Facts or Data Underlying Expert Opinion

The expert may testify in terms of opinion or inference and give reasons therefor without prior disclosure of the underlying facts or data, unless the court requires otherwise. The expert may in any event be required to disclose the underlying facts or data on cross-examination.